Editor's note: aff'd, Civ.NO. C84-404-K (D. Wyo. July 25, 1985), 616 F.Supp. 344

UNITED STATES
v.
ALBERT O. HUSMAN ET AL.

IBLA 83-307 Decided June 8, 1984

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer, holding unpatented Husman No. 1 placer mining claim invalid. Contest Wyoming 50975.

Affirmed.

1. Environmental Quality: Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements

   Where an administrative decision is made that a proposed action is not a major Federal action which will significantly affect the quality of the human environment, so that an environmental impact statement need not be filed, that decision will be affirmed on review if it appears to be the reasonable conclusion of a proper and sufficient environmental analysis compiled according to established procedures and it was made by an authorized officer, in good faith, based upon such record.

2. Mining Claims: Discovery: Generally

   The discovery of a "valuable mineral deposit" has been made where a claimant establishes the presence of locatable minerals and the evidence is of such a character that a person of ordinary prudence would be justified in the expenditure of his labors and means, with a reasonable prospect of success in developing a valuable mine. The record must establish that the locatable mineral can be mined, removed, and marketed at a profit.

3. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Determination of Validity

   Where the United States contests a mining claim for lack of discovery of a valuable deposit, it has the burden of going forward to establish a prima facie case as to that

charge; the mining claimant has the ultimate burden of overcoming, by a preponderance of the evidence, the Government's case. A prima facie case is established by the testimony of an expert witness who has examined the mineral deposits on the claim and the costs of mining those deposits, and concludes that the mineral deposits cannot be mined, removed, and marketed at a profit.

APPEARANCES: H. W. Rasmussen, Esq., Sheridan, Wyoming, for appellants; Charles B. Lennahan, Esq., Office of General Counsel, Department of Agriculture, Denver, Colorado, for U.S. Forest Service.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Albert O. Husman and others 1/ appeal from a decision of Administrative Judge Harvey C. Sweitzer dated December 30, 1982, declaring invalid the Husman No. 1 placer mining claim situated in the NE 1/4 of sec. 14, T. 53 N., R. 84 W., sixth principal meridian, Sheridan County, Wyoming. The 160 acres in question are within the Bighorn National Forest and were withdrawn from mineral entry by Public Land Order (PLO) No. 5600. 41 FR 35067 (Aug. 19, 1976). The application for withdrawal, W-49110, for protection of national forest lands, was filed on January 3, 1975, and the appropriate notation was made on the public land records. The notice of proposed withdrawal was published on January 23, 1975, at 40 FR 3614.

The Husman No. 1 placer mining claim was recorded January 2, 1973, and was located for limestone and dolomite by the claimants. The Wyoming State Office, Bureau of Land Management (BLM), issued a contest complaint on May 21, 1975, pursuant to 43 CFR 4.451, at the request of the U.S. Forest Service, Department of Agriculture. Hearings were held before Judge Sweitzer on June 4 and 5, 1981, and on November 12 and 13, 1981, 2/ and briefs were filed thereafter by the contestant and the contestees.

The key issues presented by the contest and Judge Sweitzer's holding as to each were framed in his decision as follows:

a. Whether the land encompassed by the claim has been lawfully segregated from mineral entry, and if so, what is the effective date of such segregation.

1/ Albert O. Husman, Hazel M. Husman, John M. Husman, Larry D. Baccari, Franklynne L. Baccari, Daryle O. Husman, Earleen I. Husman, and H. W. Rasmussen, are herein collectively referred to as claimants, contestees, or appellants. Torrey Moody, James Buckingham, and Dan B. Riggs have all appeared in the records as the eighth party-in-interest. Subsequent to initiation of the contest proceedings and prior to the decision appealed from, that interest was conveyed to H. W. Rasmussen.

2/ The transcripts of the hearings are identified in this decision as "J. Tr." for the June hearing and "N. Tr." for the November hearing.

Held: Said land was segregated from mineral entry effective January 3, 1975.

b. Whether the mineral claimed by the contestees is a common variety within the meaning of Public Law 167 enacted July 23, 1955, and therefore, not locatable under the general mining laws.

Held: Said mineral is not a common variety and is locatable.

c. Whether the land within the limits of the claim is non-mineral in character.

Held: The holding as to issue "d" below renders a holding on this issue unnecessary, and none is made. See United States v. Anderson, 15 IBLA 123, 125 (1974).

d. Whether the contestees have discovered a valuable mineral deposit within the limits of their claim.

Held: This issue is answered in the negative.

Judge Sweitzer then declared the subject claim "to be void, there being no discovery of a valuable mineral deposit (as of either the date the land was segregated from mineral entry or the date of hearing)."

In their statement of reasons, appellants argue that Judge Sweitzer's decision should be reversed and their claim be held valid. They allege that the decision erroneously concluded that the withdrawal segregating the land from mineral entry was proper. They also contend that conclusions of the mineral examiners relied upon to support the adverse holding were grounded upon misinterpretations of the "prudent man test," and if the test is properly applied to the evidence, it is apparent there was no prima facie showing of lack of discovery. The issues raised, they argue, should all be resolved in their favor, including a determination that the land is mineral in character.

[1] We will first address the allegation that the withdrawal was improper. The claimants argue that the withdrawal was improperly made because the Government failed to comply with section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1976), when it did not file an environmental impact statement.

A detailed and exhaustive environmental impact statement is not an absolute prerequisite to every Federal action. See 40 CFR Part 1500 (1978); 40 CFR Part 1501 (1982). Where an administrative decision is made that an environmental impact statement need not be filed, that decision will be affirmed on review if it appears to be the reasonable conclusion of a proper and sufficient environmental analysis compiled according to established procedures, and it was made by an authorized officer, in good faith, based upon such record. Colorado Open Space Council, 73 IBLA 226 (1983); Southwest Resource Council, Inc., 73 IBLA 39 (1983). An environmental analysis/assessment report was prepared concerning the pending withdrawal application which

considered several alternatives and complied with the applicable regulations, 40 CFR 1500.6 (1978). Judge Sweitzer reviewed this issue and concluded that "the government sufficiently identified relevant environmental concerns and determined that any impact is not significant. This meets the requirements. See Nader v. Butterfield, 373 F. Supp. 1175 (D.D.C. 1974)." We agree with this conclusion. Appellants have failed to show that the report lacked sufficient detail to allow an informed and reasoned decision not to prepare a full statement. Moreover, as they have not raised a substantial environmental question which has been omitted from consideration in the administrative record, they are not entitled to a review of the determination not to prepare such an environmental statement. See Providence Road Community Assoc. v. Environmental Protection Agency, 683 F.2d 80, 82 (4th Cir. 1982); Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir. 1980), cert. denied, 449 U.S. 836 (1980).

The notation on BLM records that the application for withdrawal was filed on January 3, 1975, segregated the lands from location under the mining laws. See 43 CFR 2091.2-5, 2351.3 (1974). Where land is withdrawn from the operation of the mining laws subsequent to the location of a mining claim, the validity of such a location cannot be recognized unless the claim was supported by a discovery at the time of the withdrawal. In addition, even though there may have been a proper discovery at the time of withdrawal or at some other time in the past, a mining claim cannot be considered valid unless the claim is supported by a discovery at the date of the hearing into its validity. Cameron v. United States, 252 U.S. 450 (1920); United States v. Chappell, 72 IBLA 88 (1983).

[2] Under 30 U.S.C. § 22 (1982), a claimant must establish the presence of a valuable mineral deposit in order to become entitled to a mining claim. 3/ A valuable mineral deposit exists where the mineral found is of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894). This is the "prudent man test," approved by the U.S. Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905). It has been refined to require a showing of marketability, i.e., that the mineral can be presently extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968). The issue of discovery must be resolved on the basis of the market for chemical grade limestone, and the market for limestone from the claim for those purposes for which common varieties of limestone may be used may not be considered to establish marketability at a profit. United States v. Lease, 6 IBLA 11, 79 I.D. 379 (1972); see United States v. Chas. Pfizer & Co., 76 I.D. 331 (1969).

3/ Section 3 of the Act of July 23, 1955, excluded deposits of common varieties of stone, including limestone, from location under the mining laws of the United States. 30 U.S.C. § 611 (1982); 43 CFR 3711.1(a). Chemical grade limestone is not considered a common variety and, thus, is locatable. 43 CFR 3711.1(b). The parties to the contest stipulated to the presence on the claim of at least 50,000,000 tons of limestone with a CaCO[3] content of at least 95 percent (J. Tr. 176). This constitutes a chemical grade of limestone which is locatable (J. Tr. 183).

[3] Where the Government contests a mining claim for lack of discovery of a valuable deposit, it has the burden of going forward to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of overcoming the Government's case by a preponderance of the evidence. Hallenback v. Kleppe, 590 F.2d 852, 856 (10th Cir. 1979); United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1976). A prima facie case against the validity of a mining claim is established by the testimony of an expert witness who has examined the mineral deposits on the claim and the costs of mining that deposit, and concludes that the mineral deposits cannot be mined, removed, and marketed at a profit. United States v. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982). The record discloses that appellants have envisioned two markets for chemical grade limestone from their claim, one for sugar refining and the other for stack "scrubbers" for utility plants. Both involve the process of calcining in which limestone (CaCO[3]) is heated to produce lime (CaCO)(J. Tr. 243). Claimants have projected mining approximately 100,000 tons of limestone per year from the claim which would be calcined by claimants to produce a total of 53,120 tons per year of lime (Exhs. 39, 40, and 83). The projected market would be for utility stack scrubbers at the Colstrip plant (46,200 tons per year), and the Dave Johnson plant (6,920 tons per year).

In a market study report dated November 20, 1974, U.S. Forest Service mineral examiner Amos Klein concluded, "there is no market for the limestone on the Husman No. 1 placer" (Exh. 44). He concentrated in the report on the sugar refining industry and agricultural needs. He summarized his findings regarding the sugar refining market as follows:

> 1. The sugar refineries discussed in this report obtain limestone that meets their chemical and physical specifications at a reasonable cost that will supply their needs for many years in the future. It seems illogical that the sugar companies should purchase limestone at 2 to 4 times their present costs, from a source other than their own, which is not superior physically or chemically to that presently in use.

In the report, Klein briefly addressed the market for lime in "wet scrubbers" used by nearby power producers and concluded there was no market claimants could supply at that time.

U.S. Forest Service geologists Frederic B. Mullin and John S. Dersch prepared a report dated April 22, 1981, regarding the market at the time of hearing (Exh. 45). This report determined that a market did not presently exist for the material from the contested claim. In their market analysis, the mineral examiners first reviewed limestone and lime production figures through 1979 for Montana and Wyoming (the projected market area) and available sources within that area. Then they discussed the present demand and the potential consumers. Their report indicated that demand for lime by the sugar refining industry was being filled from captive sources. Further, the report stated that consumption by local power plants for stack gas desulfurization needs was between 2,500 tons and 4,600 tons annually and that this demand was being supplied through another source (Exh. 45 at 11-12). However, information indicated that demand within this industry for an additional 20,000 or more tons was possible (Exh. 45 at 13).

In their report, the mineral examiners then analyzed the potential for contestees to enter this projected market. First, they emphasized that these projected future demands were merely speculative and that, according to available information, such demands would likely be supplied from captive sources rather than from Husman No. 1 claim. The examiners evaluated contestees' projected mining and processing costs as set forth in exhibit 39 in an effort to determine their competitive standing.

Initially, the examiners surveyed the cost of transportation for hauling lime and concluded that $0.15 per ton-mile was a reasonable projection of the cost of transporting the product to the buyer. 4/ Based on this, the cost per ton of lime delivered was calculated as $62.08 at the Colstrip plant and $66.88 at the Dave Johnson plant (Exh. 45 at 13). Although the report indicated that the current price paid for lime at the power plants was considered proprietary, the price range of $40 to $60 per ton of delivered lime was disclosed by plant personnel (Exh. 45 at 13).

The examiners' report further noted that according to cost projection by claimants (Exh. 39), the cost per ton of limestone for calcining treatment, excluding limestone which would be used for common variety purposes, is $5.16 per ton (as opposed to $2.07 per ton when limestone to be used for all purposes is included). Based on this increased cost for limestone for mill feed, the examiners' report estimated claimants' cost per ton of lime at the plant to be about $50 rather than $42.43 (Exh. 45 at 16). Using a transportation cost of $0.15 per ton-mile, they determined the delivered cost of lime to be approximately $74 per ton at Colstrip and $69 per ton at Dave Johnson (Exh. 45 at 17). Thus, the report concluded that appellants would not be in a position to enter this market. Mullin testified that at the time of the hearing he made his own estimate of the cost of limestone for calcining based on claimants' projections in exhibit 39 and arrived at a cost of $61.04 per ton of lime at the kiln before transportation, assuming natural gas is used as a heat source in the calcining process (J. Tr. 262). Accordingly, we must affirm the holding of the Administrative Law Judge that the Government had established a prima facie case of lack of marketability.

Notwithstanding the Government's prima facie case, claimants may prevail by establishing by a preponderance of the evidence that they could have mined, removed, and sold the minerals at a profit prior to the time the land was segregated from mineral entry. United States v. Alaska Limestone Corp., 66 IBLA 316, 320 (1982); United States v. Gibbs, 13 IBLA 382, 389 (1973). This hypothesis must be proven with factual evidence of conditions actually prevailing at that time. United States v. Alaska Limestone Corp., supra at 320.

4/ Claimants challenge use of the $0.15 per ton-mile figure for transportation costs in light of the testimony of Eldon Ayers, proprietor of a local trucking service, that he could do the hauling for $0.0782 per ton-mile (J. Tr. 147). However, this operation would necessitate the purchase of new equipment (trailers), and Ayers would require assurances as to the number of tons to be hauled and the duration of the contract, neither of which commitments were made (J. Tr. 153-55).

Regarding the market for limestone to be used in the sugar industry, Frederic Mullin testified that the local sugar companies had a captive source of supply for their limestone needs (J. Tr. 245). Albert Husman testified that Great Western Sugar Company was interested in claimants' limestone in 1973, but that Great Western had changed hands shortly thereafter and appellants could not interest them further in their product (N. Tr. 95).

Appellants have alleged in their brief that the Administrative Law Judge's decision improperly found appellants' market to be limited to limestone for the sugar industry and for agricultural uses. The February 18, 1974, letter from claimant Albert Husman to the Assistant Regional Forester (Exh. 17) states that the primary product will be agricultural lime with the secondary product constituting lime for the sugar industry. The fact that the initial market report of Klein was directed primarily to the sugar industry is probably attributable in substantial part to the markets set forth by claimants in the letter. However, testimony at the hearing dealt extensively with the market for limestone to be used in "scrubber" applications.

Albert Husman testified that in 1973 he had discussed the market for lime with representatives of the power plant at Colstrip, Montana, and that he was also interested in supplying lime for their needs, "but we couldn't get off first base." (J. Tr. 54). The testimony of Daryle Husman disclosed that although claimants knew in 1973 and 1974 that the lime scrubbers were a potential future market at Colstrip, no verifiable market existed at that time:

> Q. And have you ever seen any correspondence where the Forest Service was dictating to you the -- or to Mr. Al Husman the particular use that you would have to make of the material from that claim?
>
> A. It was more in line of the stress on existing markets for proof of market. At that time we could not obtain documentation as to the quantities involved at Colstrip, for instance, and, therefore, it was not admissible.
>
> Q. So at that point in time there really was no market at Colstrip; is that right?
>
> A. Oh, no. Sir, the difference is we knew that the lime scrubbers were coming -- were part of the design function, that they did not exist. It's like any other planning procedure, like now it will take us -- if we started tomorrow it would take a year or more to actually have the kiln in place and be in the market, so at that time we anticipated we would come in line in '75 if we started operations in '73.
>
> Q. But wouldn't it be correct that at this point in time when Government Exhibit 12 was written in November of '73 that Colstrip was not buying --
>
> A. That's correct, and that's the reason for judgment, for his making the judgment at that time, that it was not admissible.

(N. Tr. 197-98).

Daryle Husman acknowledged that Colstrip Unit 1 did not go into commercial operation until October of 1975 (N. Tr. 200). Richard Schrader testified that Colstrip Unit 1 had a start up date of November 1975, and unit 2 a start up date of May 1976 (J. Tr. 406). Albert Husman testified that units 1 and 2 utilize 7,000 tons of lime per year (N. Tr. 113). Further, he indicated that when units 3 and 4 come on line these units would consume 39,000 tons of lime per year, but units 3 and 4 had not commenced operation at the time of the hearing (N. Tr. 114). Larry Baccari testified that there was a scrubber market for 4,000 to 10,000 tons of calcined lime per year in 1974 (N. Tr. 241).

The most difficult factor in our determination as to the viability of the project at the time of segregation of the land and the time of the hearing is the cost of production of an amount of lime which a reasonable man could expect to sell, based on the market existing at those times. The evidence submitted by appellants regarding the cost of operation was based on the production and sale of approximately 54,000 tons of lime a year (100,000 tons of mined product). While the testimony and evidence set out above did establish that there was a reasonable expectation that a market existed, the market would not have supported an operation of the scale proposed by appellants, and, therefore, the question remains as to the ability to scale down the operation to a size in line with the expected demand. Appellants presented no testimony as to mining, processing, or transportation costs based on their evidence of what could reasonably be sold at the time. The evidence presented by appellants clearly demonstrates that certain costs would remain fixed regardless of the size of the operation. Certain other costs per ton of product would increase. For example, while appellants established that there was a trucking company willing to haul the entire 54,000 ton production at $0.07 per ton mile, the charge for a lesser amount would undoubtedly increase because of the amortization of the trucker's equipment costs against a lower tonnage. We believe that the figures fairly represent a reasonable and conservative projection of the cost of mining and processing the product, if the market were 54,000 tons a year; however, for 4,000 to 10,000 tons a year these figures approach being meaningless.

We are thus constrained on this record to affirm the conclusion of the Administrative Law Judge that claimants have not overcome the Government's prima facie case that limestone from the claim could not be mined, removed, and marketed at a profit for purposes other than those for which common varieties of limestone may be used, either at the time the land was segregated or at the time of the hearing.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge